IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 08-00026-02-CR-W-FJG**
	)	
CYNTHIA S. MARTIN,	)	
	)	
Defendant.	)	

DEFENDANT'S SENTENCING MEMORANDUM

COMES NOW the defendant, Cynthia Martin, by and through her counsel, and hereby submits this Sentencing Memorandum in the above-referenced case, pursuant to Rule 32 of the Federal Rules of Criminal Procedure. Sentencing is presently scheduled for Wednesday, April 13, 2011, at 10:00 a.m.

Ms. Martin and the undersigned counsel have thoroughly reviewed the Presentence Investigation Report ("PSR") and have discussed all issues with respect to sentencing in this case. This memorandum is respectfully filed to assist this Court in determining an appropriate sentence in this cause.

I. PROCEDURAL BACKGROUND

Ms. Martin appeared before this Court on December 18, 2008, and entered her plea of guilty to two counts of an indictment conspiracy to possess and distribute controlled substances in violation of 21 U.S.C. §§ 841(a)(1), (b)(1(D), (b)(2), (b)(3) and 846 and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). By virtue of her guilty plea, Ms. Martin admitted facts that support a full and complete factual basis. Ms.

Martin has acknowledged that she committed these offenses and that her actions were illegal and unlawful.

This Court accepted the defendant's plea of guilty and ordered the preparation of a Presentence Investigation Report by the probation office. The PSR has been finalized in this matter.

II. UNRESOLVED ISSUES WITH RESPECT TO PSR

The defendant previously submitted her comments and clarifications to the PSR. There are no legal objections to the PSR.

III. SENTENCE TO BE IMPOSED[1]

As the PSR indicates, Ms. Martin's total offense level is 17. She has a Criminal History I. As a result, she is facing an advisory sentencing range of 24 to 30 months. The government has indicated that it will file a motion pursuant to U.S.S.G. § 5K1.1 Also, the advisory sentencing range should also be tempered by the factors set forth under 18 U.S.C. § 3553(a).

U.S.S.G. 5K1.1

At the outset, it should be reiterated that Ms. Martin acknowledges her wrongdoing. She does not diminish her wrongful conduct, nor does she excuse it. She has met with government counsel and case agents on several occasions, and she freely and voluntarily

[1]Most circuits agree that there is a three-step approach to sentencing. First, the guidelines are determined. Then, departures are considered, and finally, variances are analyzed. See, *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009), *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006), c.f. *United States v. Johnson*, 427 F.3d 423 (7th Cir. 2006). For the reasons stated herein, the defendant requests a probationary sentence which is grounded primarily on 18 U.S.C. § 3553(a) factors and related variance arguments regardless of the court's final determination of the adjusted total offense level.

admitted to her actions. She participated in both proffer and trial preparation sessions. Ms. Martin worked with counsel to provide additional documents, including personal photographs, to the government in order to corroborate her testimony at the trial of three of the co-defendants, Solomon, Elder and Johnson. In addition, she testified during the trial of these same co-defendants. They were subsequently convicted by a jury. Should the Court grant the motion pursuant to 5K1.1, the defendant respectfully suggests that a sentence of probation is an appropriate sentence in this case.

Ms. Martin has accepted responsibility for her unlawful conduct in this case. In addition to the factual basis described above, she also submitted a statement of acceptance of responsibility to the probation office. The PSR recommends that the defendant receive the three-level reduction for her acceptance of responsibility. (PSR at ¶ 17, 26-27). Ms. Martin is embarrassed and remorseful for the conduct that has brought her before this Court. Her plea of guilty avoided the necessity of a complex and emotional trial. Because of her plea of guilty, the Court was saved substantial resources. While admittedly there was a tiral as to other co-defendants, Ms. Martin's decision to enter a plea shortened the length and complexity of the trial.

Ms. Martin's friends have remained loyal and supportive as evidenced by the character letters written by them on her behalf. The letters show another side of Ms. Martin that the Court could also consider in imposing sentence. It should be noted that one of the letter writers, Joseph Wood, has recently married Ms. Martin.

APPLICATION OF 18 U.S.C. § 3553(a) FACTORS

As the Supreme Court has long recognized, "it has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). With the United States Sentencing Guidelines now rendered "advisory only," *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007), a district court has substantial discretion in fashioning a sentence appropriate to the individual circumstances of the defendant and the unique facts of the offense. While the Court must consider the guideline range in a case, "the Guidelines are not the only consideration." *Gall v. United States*, 128 S. Ct. 586, 597 (2007). See *Kimbrough*, 128 S. Ct. at 564 ("the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence").

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court determined that district courts must consider all of the sentencing factors under 18 U.S.C. §3553(a)(1)-(7) without giving mandatory weight to the sentencing guidelines. The Sentencing Reform Act instructs a Court to impose a sentence "sufficient, but not greater than necessary," to comply with the stated purposes of punishment. 18 U.S.C. § 3553(a). A sentence of probation will address all goals of The Sentencing Reform Act. 18 U.S.C. § 3553(a) states, in pertinent part, as follows:

> (a) Factors to be considered in imposing a sentence.--The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the

purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for...

(5) any pertinent policy statement...

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victim of the offense.

In addition, a district court "may not presume that the Guidelines range is reasonable," and instead "must make an individualized assessment based on the facts presented." *Gall*, 128 S. Ct. at 597. Moreover, the Supreme Court has specifically ruled that, in balancing the §3553(a) factors, a judge may determine that, "in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 128 S. Ct. at 564. See *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) (a district court may consider arguments that "the Guidelines sentence itself fails properly to reflect §3553(a) considerations, or [that] the case warrants a different sentence regardless"). A district court may now vary from the applicable guideline range "based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 128 S. Ct. at 570.

Moreover, the Eighth Circuit recently held that, if a court ultimately concludes after considering the 3553(a) factors that a non-guidelines sentence is appropriate, the court's sentence is entitled to highly deferential review by the appellate court only for a clear abuse of discretion. See *United States v. Burns*, 577 F.3d 887, 894-95 (8th Cir. 2009).

Other statutory sections also give the district court discretion in sentencing. Under 18 U.S.C. §3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation. In sum, in every case, a sentencing court must now consider all of the §3553(a) factors, not just the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing.

A) 18 USC §3553(a)

1. Nature and Circumstances of the Offense and History and Characteristics of the Defendant

As described in the Offense Conduct section of this memorandum, Ms. Martin's illegal conduct was related to her involvement in delivering written prescriptions and cash to defendant Rostie at her pharmacy for defendant Solomon. This conduct occurred over a period of time. This conduct seems to be aberrational from her background, and it is extremely unlikely that she will ever reoffend.

The personal and professional history section of this memorandum and the letters presented to this Court document that Ms. Martin is capable of conforming to rules and

regulations. Her history and characteristics justify an other than guideline sentence. She made a serious mistake.

2. Need for the Sentence Imposed to Promote Certain Statutory Objectives

A sentence of incarceration is not always necessary in order to satisfy this sentencing mandate. It is the goal of sentencing to prevent unnecessary incarceration and to limit prison sentences to those individuals who pose the greatest risk to society. As renowned criminologist Norval Morris has consistently argued, and reflective of the recent Supreme Court decisions, when determining punishment, "the least restrictive (punitive) sentence necessary to achieve defined social purposes should be imposed."

Ms. Martin must be punished for her actions. However, it is imperative that a punishment be given which is proportional to the social harm committed, as determined by the Court, to serve the goals of sentencing.

(A) To Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the offense
(B) To Afford Adequate Deterrence to Criminal Conduct

A review of the criminological literature reveals that to the extent that criminal sanctions do have a general deterrent effect, the certainty (how certain an offender will be detected) of punishment has a far greater deterrent effect than the severity of the sanction.

Title 18 USC §3553(a)(2)(B)'s directive that the sentence imposed afford adequate deterrence to criminal conduct does not require a lengthy term of imprisonment. The fact that Ms. Martin was investigated, prosecuted, and pled guilty for her actions should be sufficient to deter potential offenders. In addition, for individuals such as Ms. Martin, the potential loss of their career and livelihood as a result of their actions has a significant deterrent effect,

perhaps as strong as any formal punishment meted out by the criminal justice system. Ms. Martin's recognizes that her involvement in this case is serious, but she has taken very deliberate steps to right this wrong. She has followed all pretrial directives, cooperated in the prosecution of others and remained gainfully employed. She has the tools to abide by terms of a probationary sentence, and under all the circumstances, a sentence of probation is just punishment.

(C) To Protect the Public from Further Crimes of the Defendant

Ms. Martin's behavior is uncharacteristic of the way she had conducted herself personally and professionally throughout her entire life up to, and since, the instant offense. In the letters written to the Court on her behalf, many acknowledge the fact that she showed poor judgment in this matter but in no way excuse her actions. She has disgraced herself and others close to her as a result of her arrest and conviction. She has accepted full responsibility for her illegal behavior and, through her plea agreement, has demonstrated her character.

Ms. Martin has no prior criminal history. Her first act of criminal conduct occurred at nearly age 47. The defendant presents low risk of recidivism. Defendants "over the age of 40...exhibit markedly lower rates of recidivism in comparison to younger defendants. "Recidivism rates decline relatively consistently as age increases, from 35.5% under age 21 to 9.5% over 50." See *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate*, at 12, 28 (2004). Many courts have recognized this factor in sentencing. *United States v. Lucania*, 379 F.Supp.2d 288, 297 (E.D.N.Y. 2005) ("Post-*Booker* courts have noted that recidivism is markedly lower for older

defendants."). *United States v. Carmona-Rodriguez* 2005 WL 840464, *4 (S.D.N.Y. April 11, 2005) (unpub.) (Where 55 year old woman pled guilty to distribution of drugs sentence of 30 months (below guideline range) proper in part "in view of the low probability that Carmona-Rodriguez will recidivate."

(D) To Provide the Defendant with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner

Ms. Martin graduated from Belton High School. She has been gainfully employed throughout her adult life. Ms. Martin suffers from no mental health disorders or substance abuse issues and does not require any treatment in this regard. In short, this sentencing factor simply does not apply to Ms. Martin. In fact, the information provided with regard to this factor can be considered a sentencing mitigator. She will continue to be a productive member of society.

3. The Kinds of Sentences Available

18 U.S.C. §3553(a)(3) requires the Court to consider "the kinds of sentences available" in a given case. Here, the Court has available many forms of punishment other than imprisonment which will permit it to craft an appropriate sentence for Ms. Martin probation, home detention, community confinement, fines, and community service. Indeed, employing some combination of these types of sentences will allow the Court to both punish Ms. Martin sufficiently, and allow her the opportunity to pay restitution and rebuild her life.

With the Guidelines now advisory and with the enhanced sentencing discretion mandated by *Gall*, the Court is now able to use the availability of such non-custodial sentences to further calibrate a sentence so that it is no "greater than necessary" to

accomplish the statutory purposes. As a result, in Ms. Martin's case, where there are mitigating factors, the availability of these alternatives under the law weighs in favor of the Court's use of them and against the imposition of a prison sentence. Indeed, courts have used this power in recent years to employ home detention or community confinement to address unique circumstances, even where the applicable guideline range would formerly have prohibited anything but imprisonment. See, e.g., *Coughlin*, 2008 U.S. Dist. Lexis 11263 at *14-36 (where applicable guideline range was 27 to 33 months, court imposed sentence of probation, 27 months home detention and community service based on finding that defendant's poor health would be worsened by imprisonment); *United States v. Woghin*, 04 CR 847 (ILG) (E.D.N.Y. Feb. 6, 2007) (unpublished memorandum and order)(court sentenced corporate executive convicted of a multi-million dollar corporate fraud to 24 months split sentence, with half to be served in home confinement).

4-5. The Sentencing Guidelines Provisions

While the Court must consider the applicable guideline range and Sentencing Commission policy statements pursuant to 18 U.S.C. §3553(a)(4) and (5), it is respectfully suggested that any sentence within this range would be "greater than necessary" to serve the purposes of sentencing in this case. There are mitigating factors regarding Ms. Martin's offense and her personal circumstances which are plainly not accounted for in the sterile arithmetic of the computation of the applicable guideline range.

In *Gall*, the Supreme Court ruled that, under the law, a district court "may not presume that the Guidelines range is reasonable." 128 S. Ct. at 597. Indeed, this is a case which warrants a non-guideline sentence.

Each of the relevant sentencing considerations can be satisfied without imposing an advisory guideline sentence. The felony conviction alone serves as a general and specific deterrent. There is no credible evidence that she is a candidate for recidivism. She has been shamed by her conduct. She has pled guilty, accepted responsibility, cooperated and avoided a trial. In short, there are substantial reasons as how a sentence substantially below the advisory guideline range satisfies the concerns of 18 U.S.C. § 3553 and the holding in *Booker*. While all the factors under § 3553(a) are equally important, a non-custodial sentence would be sufficient.

An excellent analysis of the impact of the federal guidelines appears in *The Champion* (Sept./Oct. 2006) in an article styled, "The Continuing Struggle for Just, Effective, and Constitutional Sentence after *United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)," by Amy Baron-Evans.

As an initial observation, Ms. Baron-Evans opines that "the guidelines 'place[s] undue weight on the amount of loss involved in the fraud,' which in many cases 'is a kind of accident' and thus 'a relatively weak indicator of the moral seriousness of the offense or the need for deterrence." She cites the following authorities in support: *United States v. Emmenegger*, 329 F.Supp. 2d 416, 427-28 (S.D.N.Y. 2004) and *United States v. Adelson*, WL 2008727 *3 (S.D.N.Y. July 20, 2006).

She also points out that the Sentencing Commission has increased the punishment for economic crimes nearly annually, especially from 1987 to 1995, resulting in an "unplanned upward drift." *Id*. at 36. As an example, it is further noted that, "In the Economic Crimes

Package of 2001, it lowered sentences for some low-loss offenders but significantly raised sentences for most mid to high loss offenders." Id. At 36.

Of particular significance to the case at bar is the research showing that the deterrence prong of 18 U.S.C. § 3553 is not necessarily satisfied with a custody sentence particularly in a white-collar case. Ms. Baron-Evans further concludes:

> The initial Commission increased sentences for economic crimes above past practice to provide a 'short but definite period of confinement for a larger proportion of these 'white collar cases' is the belief that this would ensure proportionate punishment and achieve deterrence.' A deterrence researcher advised the Commission that certainty is more important to deterrence than severity. Other research has shown that lengthy terms of incarceration have little deterrent effect on white collar offenders, presumably the most rational group of offenders.

She cites The Fifteen Year Report at 56, Hofer & Allenbaugh, *supra* note 50, at 61 n. 192; Sally S. Simpson, Corporate Crime Law and Social Control, 6, 9, 35 (Cambridge University Press 2002); and David Weisburd, et al., *Specific Deterrence is a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology, 587 (1995) in support of this contention concerning deterrence.

Ms. Martin is sincerely remorseful for her role in this case. Her wrongful conduct has placed emotional strain on her family, which she deeply regrets. Her conduct has also affected other individuals, which she also regrets. A sentence consistent with the suggestions herein would serve all of the goals of punishment established by the Sentencing Reform Act.

IV. CONCLUSION

WHEREFORE, based on the foregoing, Ms. Martin respectfully requests that this Honorable Court impose a sentence consistent with the suggestions contained in this Memorandum, and for further relief deemed proper by the Court.

In the alternative, she respectfully asks that if a custody sentence is imposed that the Court allow for self-surrender to the BOP-designated facility and for a recommendation that she be designated to a Federal Prison Camp nearest her family.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of March, 2011, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

s/ *James R. Hobbs*
Attorney for Defendant